

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1623

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P/S

To be argued by
JAMES P. LAVIN

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1623

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAFAEL NAVEDO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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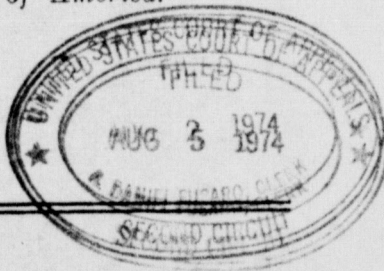


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Rafael Navedo appeals from a judgment of conviction entered on April 30, 1974 in the United States District Court for the Southern District of New York after a two day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Superseding Indictment 73 Cr. 964, filed on October 15, 1973 in three counts, charged the appellant Rafael Navedo and Migdalia Reyes in count one with conspiracy to violate the Federal Narcotics Laws, in violation of Title 21, United States Code, Section 846; count two charged Navedo alone with carrying a gun during the commission of the conspiracy charged in count one, in violation of Title 18, United States Code, Section 924(c); count three charged Navedo with an assault in violation of Title 18, United States Code, Section 111.

Trial of Navedo and Reyes commenced on March 18, 1974 and concluded on March 19, 1974 when the jury found Navedo guilty on all counts and acquitted Reyes.

On April 30, 1974 Judge Briant sentenced Navedo to three years imprisonment on counts one and three and five years on count two, the sentences to run concurrently, to be followed by six years special parole.*

Statements of Facts

The Government's Case

On April 5, 1973 Angel Rodriguez, a New York City Police Detective assigned to the United States Department of Justice New York Joint Task Force (JTF), was in an apartment at 1581 Fulton Avenue, Bronx, New York. Detective Rodriguez, acting in an undercover capacity, and a JTF informant were awaiting the arrival of the defendant Navedo (Tr. 23-24).** Shortly thereafter, Navedo and an unidentified male were observed by surveillance officers as they arrived at 1581 Fulton Avenue and entered the building (Tr. 101-102). The informant let Navedo into the apartment and introduced Detective Rodriguez to Navedo as Jose. Detective Rodriguez then showed Navedo \$3,000, the price agreed upon for four ounces of cocaine, and asked Navedo for the cocaine. Navedo replied that his partner had the cocaine outside in the hallway and that it could be cut two or three times. Navedo then left the apartment and returned ten minutes later accompanied by a man who was introduced as Roy.

* On the same day Judge Briant sentenced Navedo to four years imprisonment on his plea of guilty to Indictment 74 Cr. 360, charging a conspiracy to violate the narcotics law; this sentence runs concurrently with that imposed on the indictment in this case.

** "Tr." refers to the trial transcript, GX to government exhibits, "App." and "Br." to the appendix and brief of the defendant.

Navedo and Detective Rodriguez resumed their negotiations. Navedo refused to lower the price, and finally Detective Rodriguez took out the \$3,000 and handed it to Navedo, who refused to take it. Rodriguez then gave the \$3,000 to Roy. At Navedo's direction Roy took a plastic bag containing white powder from his coat pocket and handed it to Navedo, who in turn gave it to Detective Rodriguez. Navedo told Rodriguez to test it; Rodriguez opened the package, looked at the contents and then closed it and put it in his pocket. Roy counted the money Detective Rodriguez had given him and handed it to Navedo. Both Roy and Navedo then left the apartment, got into a Cadillac and drove away (Tr. 23-26, 53-56, 102).

A subsequent chemical analysis of the white powder which Detective Rodriguez had purchased from Navedo and Roy showed that it was not cocaine but rather procaine, a non-controlled substance, and lactose, both of which were commonly used as dilutants for cocaine (Tr. 156-168; GX 1).

Detective Rodriguez had obtained Navedo's telephone number from the informant, and on April 17, 1973, he called Navedo and discussed with him the purchase of twelve ounces of cocaine. Navedo told Rodriguez that the price for the three-eighths of a kilogram would be \$9,000. Detective Rodriguez replied that he had only \$8,500, which Navedo agreed to accept. Detective Rodriguez called Navedo back that night, and they arranged to meet at the Mia Casa social club in the Bronx to consummate the cocaine transaction. Rodriguez drove to the club and was let in by Navedo (Tr. 30-33). Inside, Navedo introduced Detective Rodriguez to Migdalia Reyes. Rodriguez told Navedo that he had the money for the cocaine but that he wanted the transaction to take place at 1581 Fulton Avenue in the Bronx, the site of the first transaction. Navedo agreed to this and stated that he would send someone over to get the

package. He then called over Reyes and told her to go and get "el colte", which in English means "the cut" (Tr. 34-35). Reyes asked Navedo where it was, and he told her to look in a bureau drawer. Navedo also told her that there was another package containing "stuffa", which in English refers to drugs, on top of the bureau. Detective Rodriguez asked Reyes also to bring a scale. Navedo then handed a set of car keys to Reyes (Tr. 34-36).

Detective Rodriguez then left the club, followed minutes later by Reyes, who got into a black and white Cadillac. Reyes drove to Sedgwick Avenue in the Bronx, where she parked the car and entered 3323 Sedgwick Avenue. Approximately 15 minutes later she left the building carrying a brown paper bag, got into the Cadillac and drove back to 176th Street, where she parked the car and went into the Mia Casa social club (Tr. 83-90).

Twenty minutes later Navedo and an unidentified man left the club and got into a black Ford pickup truck parked in front, Navedo on the passenger side and the unidentified man behind the wheel. A JTF surveillance unit followed the truck and saw it double-park in front of 1581 Fulton Avenue. State Police Investigator Leslie Grasso parked the surveillance car about fifteen feet behind the truck. As Navedo and the unknown man started to get out off the truck, Sergeant William Rawald left the surveillance car and proceeded towards Navedo. When Rawald was approximately ten feet from the truck Navedo looked in his direction and jumped back into the truck. Sergeant Rawald, with his gun drawn, ran toward the side of the truck and yelled "Stop, Police." As he reached the side of the truck, which had started to move, he saw Navedo pointing a gun at him. Sergeant Rawald fired a shot, and Navedo dropped his gun to the pavement. The unknown man who was driving accelerated the truck and pulled away, hitting several parked cars in the process. Detective William Murphy retrieved the gun

which Navedo had dropped, a .45 caliber pistol, and together with Detective Rawald and Investigator Grasso returned to the surveillance car and attempted unsuccessfully to follow the truck (Tr. 103-105; 110-129, 145-150).*

Shortly after this Detective Rodriguez telephoned the Mia Casa social club from a bar a few blocks away. Reyes answered the phone, and Rodriguez told her he was at Fulton Avenue waiting for Navedo. Reyes told Rodriguez that Navedo had left with Roy an hour before to meet with Rodriguez to do the deal (Tr. 38-39).

Subsequent to his arrest on April 17, 1973, Navedo was interviewed by an Assistant United States Attorney. After being advised of his rights, Navedo stated that he had sold cocaine to Detective Rodriguez on April 5, 1973, and had negotiated a further sale to him on April 17, 1973. Navedo specifically referred to the substance sold on April 5, 1973 as cocaine, not procaine (Tr. 130-134).

The .45 caliber pistol which Navedo pointed at Sergeant Rawald on April 16, 1973, was operable,** and Navedo was not licensed to carry a pistol in New York (Tr. 169).

The Defense Case

Navedo did not testify or present any evidence.

* Detective Murphy and Sergeant Rawald were both members of the New York City Police Department and were at the time assigned to the Joint Task Force (Tr. 99-100, 126).

** When recovered by Detective Murphy after being dropped by Navedo, the pistol was loaded with seven bullets, one in the chamber (Tr. 106; GX 2, 3).

ARGUMENT

POINT I

There was no abuse of discretion in the District Court's refusal to accept Navedo's plea of guilty to the conspiracy count.

Navedo contends that trial court committed error in refusing to accept his plea of guilty to the conspiracy count of the indictment. The argument lacks merit.

On December 11, 1973, Navedo, with the consent of the Government, attempted to enter a plea of guilty to the conspiracy count of the indictment (12/11/73 Hr. 1-16).^{*} The Assistant United States Attorney informed the Court that the Government had sufficient evidence with which to establish a prima facie case. The Assistant also stated to the Court that Navedo had on one occasion during the conspiracy sold to an undercover agent a quantity of procaine which Navedo represented as cocaine but that in fact no cocaine had ever been delivered. Judge Brieant then conducted an inquiry of Navedo to determine if there was a factual basis for the plea:

"The Court: Is there anything you want to ask the Court about your rights or about the charge against you or about the consequences of pleading guilty?

The Defendant: No, it's okay.

The Court: Will you tell me what you did with respect to this conspiracy to distribute cocaine?

^{*} References in the form 12/11/73 Hr. are to the transcript of the Navedo's attempted plea before Judge Brieant on December 11, 1973. References in the form 1/11/74 Hr. are to the transcript of the hearing before Judge Brieant on January 11, 1974.

The Defendant: He hired me to take that cocaine you know. He went with me. He paid me fifty dollars to go, you know, to go with him.

The Court: To where?

The Defendant: To—he introduced the guy, the agent, you know.

The Court: Did you carry cocaine to an agent?

The Defendant: No, Roy.

The Court: Did you carry cocaine to Roy?

The Defendant: I always go with him.

The Court: Did you deliver a package at 1581 Fulton Avenue on April 5, 1973?

The Defendant: It was Roy who took it and he paid Roy.

The Court: What did you have to do with the taking of it, if anything?

The Defendant: I went with him for the fifty dollars.

The Court: Did he tell you it was cocaine in the package?

The Defendant: Yes.

The Court: Did you believe it was cocaine in the package?

The Defendant: That's what he said.

The Court: What was your purpose in going along?

The Defendant: Well, for the fifty dollars. I wasn't working at that time, and I have five kids to support.

The Court: What were you supposed to do in order to become entitled to the fifty dollars?

The Defendant: He told me to accompany him to be with him.

The Court: For what purpose?

The Defendant: I don't know why. He just told me that, and that's what I did.

The Court: Are you in the habit of getting paid just to go with people? Did you have any function there?

The Defendant: I did it with him two times.

The Court: When was the other time?

The Defendant: The time he got away from the cops.

The Court: Was he delivering something then?

The Defendant: He was supposed to take something to someone.

The Court: What was the something he was supposed to take?

The Defendant: The same thing, you know, to the same agent.

The Court: All right. Did you do this knowing that you were assisting somebody in delivering cocaine?

The Defendant: When he spoke to me, I did go with him knowing that he was going to deliver the cocaine.

The Court: And you knew that was wrong?

The Defendant: Yes." (12/11/73 Hr. 10-13)

Judge Brieant, stating he was concerned about the sale of what turned out in fact to be procaine and the absence of the transfer of cocaine in the case, reserved decision (12/11/73 Hr. 13-14). On January 11, 1974 he refused to accept Navedo's plea on the grounds that there was an insufficient facual showing that there was at least one other co-conspirator involved who had the specific intent to engage in a narcotics conspiracy. (1/25/74 Hr. 3). Navedo's trial and conviction later followed.

Relying on *United States v. Gaskins*, 485 F.2d 1046 (D.C. Cir. 1973), *Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1968) and *McCoy v. United States*, 363 F.2d 306 (D.C. Cir. 1966), Navedo now claims that the rejection of the plea constituted an abuse of discretion which re-

sulted in the imposition of an additional two years of imprisonment.* Navedo's argument is without merit.

A defendant does not have a constitutional right to have his guilt plea accepted. *Lynch v. Overholser*, 369 U.S. 705, 719 (1962); *North Carolina v. Alford*, 400 U.S. 25, 38 n. 10 (1970). Rule 11 of the Federal Rules of Criminal Procedure expressly makes the acceptance of a guilty plea a matter for the District Court's discretion, and a guilty plea may properly be refused in the exercise of sound judicial discretion. *Santobello v. New York*, 404 U.S. 257, 262 (1971). While the Supreme Court has not delineated the scope of a District Judge's discretion in rejecting a guilty plea, *North Carolina v. Alford*, *supra*, 400 U.S. at 38 n. 11, it has made clear that a defendant's guilty plea should be examined with care before it is accepted. *McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969).

Quite apart from vesting the District Court with discretion to reject a guilty plea, Rule 11 *requires* that before judgment can be entered on a guilty plea, the Court must be satisfied "that there is a factual basis for the plea." While the cases from the District of Columbia Circuit upon which Navedo relies suggest that, in determining the factual basis for a plea, a trial judge should not ignore adequate evidence from other sources and instead insist upon wringing an unequivocal admission of guilt from the defendant, it is equally true that an inadequate statement from a defendant on allocution which is not supplemented sufficiently by evidence from the prosecution will not support a judgment entered on the plea. *United States ex rel. Dunn v. Casscles*, 494 F.2d 397 (2d Cir. 1974). The situation which confronted Judge Brieant when he heard Navedo's allocu-

* Navedo received three years on the conspiracy count, five years on count two, which charged him with carrying a gun during the commission of the conspiracy, and three years for the assault charged in count three.

tion on his guilty plea makes clear that his refusal to accept the plea was a sound exercise of his discretion under Rule 11 and may well have been compelled by the requirement of the Rule that he be satisfied that there was a factual basis for the plea.

In the *voir dire*, Navedo said that he had accompanied Roy, in exchange for fifty dollars, on the April 5 and the aborted April 17 deliveries, that Navedo's role was merely ". . . to accompany him to be with him" (12/11/73 Hr. 12) and that it was Roy who transported the substance involved, which Roy said was cocaine. However, as the Assistant United States Attorney properly told Judge Brieant at the time of the plea, the only substance ever delivered was the procaine, not a controlled substance, that Navedo and Roy produced on April 5.

For Navedo to be guilty of the crime of conspiracy to distribute narcotics, there had to be at least one person acting in concert with Navedo believing that the substance to be distributed was an unlawful narcotic, as Navedo apparently did. *United States v. Hysohion*, 448 F.2d 343, 346-347 (2d Cir. 1971); *United States v. Postma*, 242 F.2d 488, 492 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957). Since on April 5 * the substitution of the procaine undoubtedly resulted in a profitable swindle of the agents, it was quite reasonable for Judge Brieant to suppose that the delivery of the procaine was deliberate, *United States v. Alsondo*, 486 F.2d 1339 (2d Cir. 1973), *cert. granted as United States v. Feola*, 42 U.S.L.W. 3584 (April 16, 1974) ** and that only a seller's underling in the transaction, as Navedo painted himself in his allocution, would, like the purchasers, be unaware that the substance was not cocaine. Since, on Navedo's version of the facts, the only other member of the

* Nothing was ever delivered or seized with respect to the April 17 transaction.

** Judge Brieant presided at the trial of that case.

conspiracy was Roy,* who was in charge, and since it was not clear that Roy was unaware that what was delivered was *pracaïne*, Judge Brieant was properly hesitant to find that Navedo had acted in unlawful concert with anyone else who believed that the substance they were delivering was truly a narcotic rather than an uncontrolled substance like *procaïne*. Cf. *United States v. Johnson*, 495 F.2d 242, 244 (10th Cir. 1974). Nothing the Government said at the time of the plea (12/11/73 Hr. 8-9) supplied "... the missing elements by way even of an offer of . . . proof. . ." *United States ex rel. Dunn v. Casscles, supra*, 494 F.2d at 400.

This case, we submit, is not a usual one, for it seems clear that in ordinary circumstances Navedo's statements to Judge Brieant regarding the complicity of Roy, whom he said had told him that what they were delivering was cocaine, would have been a sufficient factual basis to support a plea of guilty to Count One. However, since the Assistant United States Attorney advised Judge Brieant, as he should have, that what Roy had said on April 5 was cocaine was in fact not an illegal substance, the question of Roy's knowledge and intent made Navedo's participation in a conspiracy with him sufficiently doubtful to make a rejection of the plea, if not mandatory, at the very least a reasonable exercise of discretion. *United States v. Melen-drez-Salas*, 466 F.2d 861 (9th Cir. 1972); *United States v. Pineda-Espinoza*, 455 F.2d 498 (9th Cir. 1972); *United States v. Bednarski*, 445 F.2d 364 (5th Cir. 1971); *Maricell v. United States*, 368 F.2d 735 (9th Cir. 1966).**

* Navedo never mentioned Reyes in his allocution.

** Navedo's other argument—that if there was an insufficient factual basis to accept the plea there was insufficient evidence to support the verdict—is absurd. The Government's evidence at trial establishes that Navedo lied to Judge Brieant on the *voir dire*. Far from being a man hired by Roy for \$50 on two occa-
[Footnote continued on following page]

POINT II

The uncontroverted evidence at trial amply established Navedo's guilt of assault and there was no error in the Court's charge.

Navedo argues that there was insufficient evidence to support the guilty verdict on count three, the assault count. He also contends that the trial court erroneously charged the jury on this count. Both arguments are without merit.

A. The Sufficiency of the Evidence

The uncontroverted evidence at trial showed that during a meeting at the Mia Casa Social Club on April 17, 1973, Navedo agreed to sell Detective Rodriguez three-eighths of a kilogram of cocaine for \$8,500. At Detective Rodriguez' request, Navedo agreed to have the transaction take place in the apartment at 1581 Fulton Avenue in the Bronx, where he had first met Detective Rodriguez (Tr. 30-36). That same evening, after Reyes had returned to the social club with the drugs and cutting material Navedo had sent her to get, Navedo and an unidentified man * were seen getting into a pickup truck parked in front of the club. The truck was followed by a Joint Task Force surveillance car to 1581 Fulton Avenue, where it was double-parked with

sions "to go along," Navedo was clearly the prime mover in the scheme. On April 5, Roy took the risk of carrying the "cocaine", but it was Navedo who ended up with the \$3,000. Similarly, it was Navedo who negotiated with Detective Rodriguez on April 17 and determined what price would be paid for the cocaine, later dispatching Reyes to pick it up. Since it is clear from Navedo's post-arrest admissions that he thought he was selling cocaine, it is hardly likely that Roy, whom the jury could find to be Navedo's subordinate, knew what was really being sold; indeed, since Roy saw Rodriguez pay \$3,000 for the powder he delivered on April 5, he clearly had every reason to believe he was involved in a narcotics transaction unless told the contrary.

* Obviously Roy (Tr. 38-39).

the surveillance car about 15 feet behind it. As Navedo got out of the passenger side of the truck, Sergeant Rawald left the surveillance car and proceeded towards Navedo, who at that moment turned and looked in Sergeant Rawald's direction. Navedo immediately jumped back into the truck, and Sergeant Rawald, with his gun drawn, ran toward the side of the truck. As he was approximately three or four feet from its side, Rawald yelled, "Stop, Police" (Tr. 103-104, 114). As he reached the side of the truck Rawald saw Navedo pointing a pistol out the window at him. Rawald fired a shot which missed Navedo, who dropped his loaded .45 caliber pistol to the pavement. The driver, who at that point had started the truck, accelerated and sped from the scene, hitting several parked cars on the way (Tr. 104-107, 109-130, 145-150).

In what can only be classified as an exercise in sheer fantasy, Navedo now asserts that he acted in self-defense. Blithely ignoring and adding evidence to the record, he claims that he was "[s]tartled by this armed attack, and unaware who these men were," that the officers did not identify themselves, that Navedo "did not assault Rawald *after* he had identified himself as a policeman," and that Navedo "made no attempt to fire the pistol." Accordingly, Navedo contends that "[u]nder these circumstances, appellant was entitled to use reasonable force to protect his property and his person" and "appellant's use of the pistol to threaten Rawald cannot be considered unreasonable force, and was therefore justified" (Br. 28-30).*

* Navedo also contends that Navedo undoubtedly recognized Detective Murphy as one of the drug dealers to whom he and "Roy" had sold a quantity of cocaine on April 5 and that Navedo must have been in fear of physical reprisals since Rodriguez, "*Murphy's undercover partner*" had complained to Navedo about the poor quality of the goods (Br. 30; emphasis added). It is clear from the record, however, that Murphy, who was on surveillance duties, never accompanied Rodriguez and never met Navedo prior to the latter's arrest (Tr. 126-152).

As attractive as these conjectures might now appear, they have no basis in the record. Navedo did not testify at trial, nor did he offer any other evidence whatsoever either to controvert the Government's account of the incident or to support his present fanciful version of it. There can be no doubt that Navedo's conduct constituted an assault as defined by Section 111 of Title 18, United States Code. *United States v. Martinez*, 465 F.2d 79, 81-82 (2d Cir. 1972); *United States v. Bamberger*, 452 F.2d 696 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); *United States v. Ulan*, 421 F.2d 787 (2d Cir. 1970); *United States v. Heliczer*, 373 F.2d 241 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967). Though there are certain situations in which a combination of circumstances may provide a defendant charged under Section 111 with a defense of justification or self-defense, *United States v. Ulan*, *supra*, 421 F.2d at 789-790, it is perfectly obvious that on the facts here Navedo was not entitled to any such claim. It is not contested that the attempt to arrest Navedo was lawful. The record makes clear (Tr. 103-104, 114) that Navedo pointed a loaded .45 caliber pistol at Sergeant Rawald *after* Rawald had identified himself as a police officer, and it is conceded that this occurred during the course of Navedo's participation in a narcotics conspiracy. Accordingly, as he was being lawfully arrested and as the record establishes that at the time of the assault Navedo was not "one who has no actual knowledge that he is being arrested and the circumstances are such as to afford him no reasonable ground to suppose he is being arrested . . .", *United States v. Ulan*, *supra*, 421 F.2d at 790, makes clear that Navedo had no colorable claim to self defense.

B. The Charge to the Jury

Relying on *United States v. Rybicki*, 403 F.2d 599 (6th Cir. 1968) and *United States v. McKenzie*, 409 F.2d 983 (2d Cir. 1969), Navedo claims that it was plain error for the trial judge not to charge the jury that to convict it had to find that at the time of the assault Navedo knew that Rawald was a law enforcement officer "[b]ecause the officers did not identify themselves to appellant and, in fact, acted so as to obscure their identity from him, and because, in these circumstances, it was reasonable for appellant to believe he was being assaulted . . ." (App. Br. 31-32). The contention is without merit. First of all, it is based on a total misapprehension of the record, as already noted. Secondly, as Judge Seitz pointed out in *United States v. Goodwin*, 440 F.2d 1152, 1155 n. 3 (3d Cir. 1971), this Court "expressly rejected" the analysis of *McKenzie* and *Rybicki* in *United States v. Ulan*, *supra*. As already discussed, under the tests enunciated in *Ulan* Navedo had no colorable basis to claim self-defense, and lack of knowledge of Rawald's identity would be no more than a part of such a defense. *United States v. Ulan*, *supra*, 421 F.2d at 790. Consequently, had defense counsel requested the instruction the omission of which is now pressed as plain error, the trial judge would have been bound to refuse it. See *United States v. Linn*, 438 F.2d 456, 460-461 (10th Cir. 1971); *United States v. Applegate*, 424 F.2d 1042 (9th Cir.), *cert. denied*, 400 U.S. 841 (1970). Cf. *United States v. Lozaw*, 427 F.2d 911, 916 (2d Cir. 1970). In any event, the failure to make a timely request for such an instruction, or to object to its omission, forecloses a complaint made for the first time on appeal. Fed. R. Crim. P. 30; *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

POINT III

There was no error in the admission of Navedo's post-arrest statement.

Navedo asserts that the admission of his post-arrest statement, purportedly obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), was plain error requiring the reversal of his conviction. The argument is without merit. The *Miranda* point was not raised specifically at trial and cannot be raised for the first time on appeal. *United States v. Purin*, 486 F.2d 1363, 1368 (2d Cir. 1973), cert. denied, 42 U.S.L.W. 3666 (June 3, 1974); *United States v. Bryant*, 480 F.2d 785, 791-93 (2d Cir. 1973); *United States v. Bell*, 464 F.2d 667, 674 (2d Cir.), cert. denied, 409 U.S. 991 (1972). See also *United States v. Rose*, Dkt. No. 73-2760 (2d Cir., July 10, 1974), slip op. at 4798-4799;

Moreover, Navedo's *Miranda* claim has no substance. Although he had the services of an interpreter at the trial, the record establishes that at his post-arrest interview his English was adequate (Tr. 134-135, 140-143), and Judge Briant, although he did say that Navedo had a "language problem" (Tr. 286), also noted that Navedo understood English "pretty well" (Tr. 291, 293). There is nothing in the record to suggest that Navedo did not understand his *Miranda* warnings when they were read to him. Furthermore, Assistant United States Attorney Pykett's notes of his post-arrest interview of Navedo (App. Item E), upon which Navedo relies on appeal although they were never received in evidence, establishes that Navedo gave a lengthy statement in English at the interview.

Navedo's other point is that because Pykett's notes indicate that in response to Pykett's statement, "If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer

any questions before this attorney is appointed and you can consult with him. Do you understand that?" Navedo responded, "I don't have enough money for a lawyer," Navedo's answer meant that a lawyer should have been obtained for him before any further questioning. However, "[t]he burden of furnishing an attorney only attaches upon representation of an individual that he is indigent and that he wishes an attorney." *De La Fe v. United States*, 413 F.2d 543, 544 (5th Cir. 1969) (emphasis supplied). Similarly, although Navedo is certainly correct that any indication on his part that he wished to remain silent required that all questioning cease, *Miranda v. Arizona*, *supra*, 384 U.S. at 473-474, his statement that he could not afford a lawyer can hardly be understood to have meant that; moreover, his affirmative response immediately thereafter when asked if he wished to make a statement, coupled with the lengthy statement that followed, establishes that he had no desire to remain silent or to consult an attorney and knowingly waived his rights. In short, Navedo's statement was not obtained in violation of *Miranda* and was properly admitted at trial. *United States v. Olivares-Vega*, 495 F.2d 827 (2d Cir. 1974); *Massimo v. United States*, 463 F.2d 1171 (2d Cir. 1972) *cert. denied*, 409 U.S. 1117 (1973); *United States v. Sanchez*, 483 F.2d 1052, 1057-58 (2d Cir. 1973); *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973). *United States v. Carneglia*, 468 F.2d 1084, 1090 (2d Cir. 1972), *cert. denied as Inzerillo v. United States*, 410 U.S. 945 (1973); *United States v. Lamia*, 429 F.2d 373, 375-376 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970).*

* Navedo's irresponsible claims of unethical prosecutorial behavior (Br. 38-40) and incompetence of defense counsel below (Br. 34n, 39-40) are wholly without basis and do not merit a response. See *United States v. West*, 494 F.2d 1314, 1315 (2d Cir. 1974); *United States v. Yanishefsky*, Dkt. No. 74-1117 (2d Cir., July 30, 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN III being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

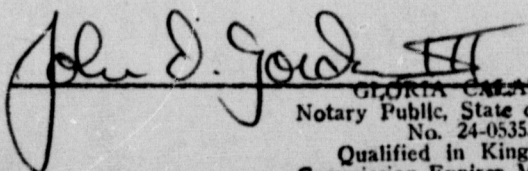
That on the 5th day of August, 1974
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

WILLIAM J. GALLAGHER, ESQ.
The Legal Aid Society
Federal Defender Services Unit
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Foley Square
New York, New York 10007

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

Sworn to before me this

5th day of August, 1974


GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1978
